

***United States Court of Appeals  
for the Second Circuit***



**INTERVENOR'S  
BRIEF**





ORIGINAL

77-4162

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

CROSS-SOUND FERRY SERVICES, INC.

Petitioner,

v.

THE UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION,

Respondents.

No. 77-4162

(Petition for Review of  
A Decision Of The Inter-  
state Commerce Commission)

BRIEF OF INTERVENOR  
MASCONY TRANSPORT AND FERRY SERVICE, INC

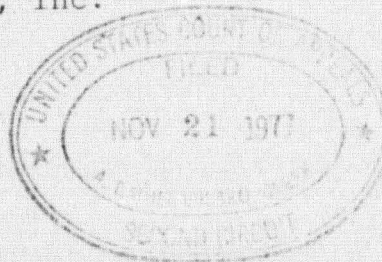
ROBERT W. GINNANE  
OLGA BOIKESS  
ARTHUR D. BERNSTEIN  
Galland, Kharasch, Calkins  
& Short  
1054 Thirty-First Street, N.W.  
Washington, D. C. 20007  
Tel: (202) 333-2200

FRANK J. WEINER  
WESLEY S. CHUSED  
15 Court Square  
Boston, Massachusetts 02103  
Tel: (617) 742-3530

RICHARD T. HAEFELI  
McNulty, DiPietro, Nesci  
& Haefeli  
130 Ostrander Avenue  
P. O. Box 757  
Riverhead, New York 11901  
Tel: (516) 727-8200

Attorneys for Mascony Transport  
and Ferry Service, Inc.

Dated: November 21, 1977





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FOR THE SECOND CIRCUIT

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|----------------------------------|---|----------------------------|
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|                                  | ) |                            |
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|                                  | ) |                            |
| v.                               | ) | No. 77-4162                |
|                                  | ) |                            |
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ROBERT W. GINNANE  
OLGA BOIKESS  
ARTHUR D. BERNSTEIN  
Galland, Kharasch, Calkins  
& Short  
1054 Thirty-First Street, N.W.  
Washington, D. C. 20007  
Tel: (202) 333-2200

FRANK J. WEINER  
WESLEY S. CHUSED  
15 Court Square  
Boston, Massachusetts 02108  
Tel: (617) 742-3530

RICHARD T. HAEFELI  
McNulty, DiPietro, Nesci  
& Haefeli  
130 Ostrander Avenue  
P. O. Box 757  
Riverhead, New York 11901  
Tel: (516) 727-8200

Attorneys for Mascony Transport  
and Ferry Service, Inc.

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Other Authorities

- Burger, "Miami-Los Angeles and NEPA: The Use of the Environmental Policy Act of 1969 as an Anticompetitive Weapon," Journal of Air Law and Commerce, Summer, 1976, Vol. 42, No. 3, 329-573. 13, 31
- Report No. 93-1111, SEenate Committee on Public Works, 93rd Cong., 2nd Sess., (1974). 36



I. ISSUES

1. Did the Interstate Commerce Commission satisfy the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq., in reaching its decision in this case?

2. Did the Interstate Commerce Commission's grant of a water carrier certificate to permit a competitive operation to seek to establish itself in a hitherto monopoly market, where additional local permits must yet be acquired, constitute an abuse of discretion?

3. Was the Interstate Commerce Commission's refusal to admit evidence of changes in protestant's operations submitted after close of the record an abuse of discretion or otherwise reversible error?

4. Did the Interstate Commerce Commission err in denying Amtrak's petition for leave to intervene with respect to New London grade crossing issues?



## II. COUNTER-STATEMENT OF THE CASE

This case arises from a petition for review of orders of the Interstate Commerce Commission (ICC or Commission) served on October 22, 1975, November 19, 1976, June 16, 1977 and August 29, 1977 in its Docket No. W-1270, Mascony Transport and Ferry Service, Inc., Initial Operations - New London to Greenport, L.I., New York. The order served November 19, 1976, is reported at 353 I.C.C. 60; this order grants an application of Mascony Transport and Ferry Service, Inc. (Mascony or applicant) and authorizes Mascony to operate as a water carrier pursuant to the provisions of section 309(c) of the Interstate Commerce Act, .49 U.S.C. §909(c) in competition with petitioner Cross-Sound Ferry Service, Inc. (referred to hereinafter as "Cross-Sound" or included in the term "petitioners"). It is this order, JA Doc. 324, which in substance petitioners seek to overturn.

By application filed May 29, 1973, Mascony sought authority:

to engage in operation, in interstate or foreign commerce, as a common carrier by water in the transportation of general commodities and passengers by self-propelled vessels, between the ports of New London, Conn., and Greenport, Long Island, N.Y.;

Protests were filed by several parties including New London Freight Lines, Inc. (NLFL) which had been operating an essentially monopoly ferry service over a similar route for a number of years. Subsequent to the conclusion of hearings and issuance of the Administrative Law Judge's (ALJ) initial decision in this case, the Commission authorized the transfer



to Cross-Sound of the pertinent authority from NLFL; this transaction was then consummated on May 23, 1975, and six months later Cross-Sound filed a motion to be substituted for NLFL. The ICC granted this motion in its November 19, 1976 order. Cross-Sound filed the petition by which this review proceeding was instituted.<sup>1/</sup>

The application was assigned for oral hearing and hearings were held before Administrative Law Judge (ALJ) David H. Allard at New London, Conn. on October 29, 30 and 31 and November 1, 1973 at Greenport, N.Y. on December 10, 11, 12 and 13, 1973 and January 8, 9 and 10, 1974 and at Washington, D.C. on February 20, 1974.

By order served March 26, 1974, the record in these proceedings was closed as of March 19, 1974 and the due date for filing briefs was set at May 6, 1974, later extended to May 23, 1974.

On June 19, 1974, the ICC served the ALJ's Initial Decision denying the application. Joint Appendix (JA) Doc. 188.

On August 19, 1975, Mascony filed exceptions to this decision and petitioned the ICC to reopen the record for receipt of additional evidence bearing on certain environmental considerations raised therein. JA Doc. 207. A reply was filed by NLFL and its commonly owned fellow-protestant, petitioner B&PJ, on September 30, 1974.

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<sup>1/</sup> For simplicity, and since Cross-Sound relies largely on NLFL's opposition below, at points in this brief where appropriate we have referred to "Cross-Sound/NLFL," e.g. when discussing various pleadings before the ICC.



On October 22, 1975, the ICC issued an order reopening the record to order the preparation of an environmental evaluation in accordance with the National Environmental Policy Act of 1969 (NEPA) and to receive the additional evidence which related to this issue. JA Doc. 249. On November 21, 1975, Cross-Sound (which had obtained NLFL's authority, supra) and B&PJ filed a petition for reconsideration and to reopen for receipt of additional evidence bearing on "changed circumstances" regarding their services. JA Doc. 282.

On February 3, 1976 the ICC issued a draft environmental impact statement (EIS) and served this upon numerous Federal, state and local agencies as well as all parties, inviting comments on or before March 22, 1976. JA Doc. 294. Such comments were filed by many of those served, as discussed in detail below in the argument section of this brief. On June 11, 1976, the ICC issued its final EIS which appended all comments and included a paragraph-by-paragraph analysis thereof by the ICC's Environmental Staff. JA Doc. 315.

On November 19, 1976, the ICC served the decision of Division 1 reversing the ALJ's Initial Decision and providing for a conditional three-year grant of authority, with Commissioner Murphy dissenting. JA Doc. 324.

On December 20, 1976, petitions for reconsideration of the majority decision were filed to which applicant replied on January 10, 1977.



By order served April 8, 1977, the ICC granted certain additional petitions to intervene, denied all petitions for reconsideration, and reopened the proceeding solely for receipt of verified statements and reply verified statements relating to Mascony's docking, staging, and loading sites at Greenport, New York and New London, Connecticut. JA Doc. 356. Pursuant to that order such statements and reply statements were filed. JA Docs. 357, 359, 361, 362, 364, 365, 366. Mascony submitted a rebuttal verified statement, which was rejected by the ICC.

On May 18, 1977, the National Railroad Passenger Corporation ("Amtrak") first indicated any interest in this proceeding by submitting a letter to the Commission requesting an extension of time in which to "determine whether we should endeavor to participate." (Doc. 360, not included in JA). By letter of May 23, 1977 the request was denied on the grounds that Amtrak was not a party to the proceeding. On June 7, 1977, Amtrak filed a petition for leave to intervene. JA Doc. 374. On June 16, 1977, the ICC served an order denying Amtrak's request to intervene since the material it was seeking to argue had been substantially covered in the EIS and no good reason was presented for reopening the proceeding at that point. This order also analyzed the verified statements and reply verified statements submitted on both sides; rejected Mascony's rebuttal verified statement; and affirmed the ICC's decision that applicant



should be granted a three-year term certificate. JA Doc. 378.

On July 12 through 18, 1977, petitions for reconsideration of the Commission's order of June 16 were filed; on August 1, 1977 the U.S. Department of Transportation (DOT) filed petitions for leave to intervene and for leave to submit a late-filed petition for reconsideration. JA Docs. 391 and 392. By order served August 23, 1977 the ICC denied the petitions.

On September 6, 1977 and September 12, 1977, respectively, Cross-Sound and Amtrak filed petitions requesting a finding that the proceeding presented an issue of general transportation importance. On September 6, 1977 Cross-Sound filed a petition with the ICC requesting that the effectiveness of its order be stayed pending appeal. On September 22, 1977 the ICC issued (a) its order, adopted at a General Session of the Commission, denying the requests for a finding of general transportation importance<sup>2/</sup> and (b) its order, by Chairman O'Neal, denying the request for stay of its earlier orders. JA Docs. 403, 404. A Motion for Stay was then submitted to this Court and denied on October 4, 1977.

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<sup>2/</sup> Chairman O'Neal and Commissioner Brown voted to deny the GTI petitions but to reopen the proceeding and accept and consider the petitions for intervention and DOT's petition for reconsideration. Commissioner Murphy voted to grant the petitions.



### III. ARGUMENT

#### A. Introduction.

This case involves the attempts of Cross-Sound and B&PJ, which presently operate ferry service from Long Island to Connecticut without competition, to keep Mascony from instituting a competing service. 3/ The Interstate Commerce Commission has issued a certificate of public convenience and necessity authorizing Mascony to operate a service between Greenport, New York and New London, Connecticut. Petitioners have appealed to this court to overturn the ICC's decision and retain their monopolistic position.

In 1973, Mascony bought a large ferry and contracted to acquire three other vessels, intending to start a ferry service from Greenport to New London. The existing Long Island-Connecticut ferry services were commonly owned or controlled by the McAllister family.4/

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3/ A third petitioner is Shelter Island & Greenport Ferry Service, based on concern with harbor traffic. The Town of Shelter Island supported the application before the ICC (JA Vol. II, Ex. 71). A fourth petitioner, Village of Greenport, has been on both sides of the issue during the course of the proceedings. At one time it favored Mascony's operation (JA Vol. II, Ex. 90). Later it reversed itself and opposed Mascony.

4/ Mr. McAllister testified at the hearings on Mascony's application that NLFL, Cross-Sound's predecessor in interest and protestant before the ICC, was a wholly owned subsidiary of McAllister Brothers, Inc. (three McAllister brothers owned 88% of the stock). (JA Vol. II, TR 1749-1753). Forty-seven percent of the stock of B&PJ was owned by NLFL, and the McAllisters, including son-in-law Brent Lynch, were principally responsible for managing the lines. (JA Vol. II, TR 1755-56). While proceedings were pending, NLFL's operating authority was acquired by Cross-Sound. Mr. Lynch is 50% owner of Cross-Sound, according to ICC annual reports. The McAllister family continues to control the existing Long Island Sound ferry operations.



Mascony planned to offer a service to compete with NLFL which operated from Orient Point, just east of Greenport, to New London. But before it could begin operations, Mascony needed to secure an ICC certificate of public convenience and necessity. Carrier-petitioners have opposed Mascony every step of the way "for competitive reasons", as their brief here frankly admits (Pet. Brief, p. 14).

In this appeal, it is plain that "competitive reasons" rather than solid legal contentions are at issue. Petitioners' case seeks to ignore the record on the environmental issue including the inherent fuel savings in ferry operations, and reflects a mistaken notion as to the ICC's jurisdiction to impose safety requirements at railroad crossings, or to clear up traffic congestion. Although petitioners cast their complaint in procedural terms -- objecting to the environmental procedures and the ICC's failure to consider evidence of Cross-Sound/NLFL's "changed circumstances" as to their operations -- the real complaint is that the ICC opted for increasing competition rather than protecting an existing monopoly service. Finally, petitioners argue that the ICC should not issue a certificate because Mascony may not be able to begin operations until it secures other local approvals.



In light of the nature of petitioners' arguments, it is important to note both what the Commission did here and how it did it. Applying the standards of Section 309(c) of the Interstate Commerce Act (the Act), it found that the new ferry service proposed by Mascony is required by "the present and future public convenience and necessity", and that Mascony "is fit, willing, and able properly to perform such service" (JA Doc. 324, 353 I.C.C. at 71). The Commission's conclusion as to public convenience and necessity was based upon its detailed analysis of the shortcomings in the competitive ferry service operated by Cross-Sound (and, until recently, its predecessor NLFL) (JA Doc. 324, I.C.C. at 68).

As to the competitive impact of authorizing Mascony's proposed service, the Commission noted that "The benefits of a new service might very well lead to additional passengers ...thereby providing sufficient volume to support both operations". (JA Doc. 324, 353 I.C.C. at 69) On its face, this is a plausible possibility which the Commission could take into account. However, the Commission went on to state its view that:

"...even if the new operations should disrupt the existing service, there is no right to engage in water transportation without competition, especially where, as here, the service provided has not been satisfactory....Although Cross-Sound's service may prove superior to that of NLFL, the past history of difficulties with the existing ferry service warrants the authorization of a second new service in competition with Cross-Sound's new service."



The Commission refused to reopen the record to permit Cross-Sound to present evidence of "changed circumstances" in its operations -- e.g., the institution of a reservations system and year-round service such as Mascony had included in its proposed service. The Commission's refusal was based upon the ground that a further reopening would unduly prolong the proceeding, citing I.C.C. v. Jersey City, 322 U.S. 503, 514, 64 S.Ct. 1129 (1944) (JA Doc. 324, 353 I.C.C. at 63-64). Moreover, as we point out below, it is settled law that in determining what service is required by present and future convenience and necessity, the Commission is not bound to give decisive weight to the belated service improvements of an existing carrier seeking to fend off the threat of competition from a new service.

While finding that Mascony is fit, willing and able to operate its proposed ferry service, the Commission noted that Mascony does not have definitive arrangements, permits, etc. for docks in New London or Greenport:

"Should such permits be withheld and applicant be unable to locate a different site in Greenport or New London that would enable it to secure the required permit, then the proposed operation would in all likelihood never begin."  
(JA Doc. 324, 353 I.C.C. at 71).

Accordingly, the Commission authorized the issuance of a certificate for only three years. The Commission explains:

"This will give this Commission an opportunity to determine if applicant



has in fact begun to operate, is operating in the manner it has proposed, and is in good faith taking measures necessary to alleviate adverse environmental impacts." Id.

In effect, what the Commission did was to issue an experimental certificate in the sense that if Mascony is able to arrange the docking facilities which it needs, consistent with environmental considerations, it will have an opportunity to show that it can operate its proposed service. If it cannot make such arrangements then there will be no competitive service. The Commission has simply said that it will not block the institution of improved service which it found that the public needs. The Commission was aware that Mascony needs local permits which it is powerless to grant. If local authorities took the position that they would not act until Mascony had an ICC certificate, and if it were held that the ICC could not act until the local permits had been issued, then no new service could ever be established, no matter how great the public need. The Commission's resolution of this problem was rational and consistent with the public interest.

As we will detail hereafter, the petitioners' attacks upon the Commission's conclusions amount to a contention that the entry provisions of the Act must be applied exclusively to protect the interests of existing carriers -- without regard to the benefits to the public from the competition of newly authorized carriers. We submit that the petitioners' basic case was rejected by the Supreme Court in its recent and unanimous decision in



Bowman Transportation Company v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438 (1974).

While Bowman involved an attack upon the Commission's grant of a motor carrier certificate of public convenience and necessity under section 207 of the Act (49 U.S.C. §307), it is wholly controlling here because the standards are identical with those of section 309(c).

Before the Commission, petitioner Cross-Sound contended that the ICC's authorization of a competitive ferry service by Mascony was erroneous as a matter of law in that the volume of present or potential traffic would not support two ferry services. The Supreme Court's Bowman decision disposes of this basic contention of Cross-Sound as follows:

"[the Commission] could conclude that the benefits of competitive service to consumers might outweigh the discomforts existing certificate carriers could feel as a result of new entry. [fn. omitted] Our decisions have dispelled any notion that the Commission's primary obligation is the protection of firms holding existing certificates.

\* \* \*

"And in United States v. Dixie Highway Express, 389 U.S. 409, 86 S.Ct. 539, 19 L.Ed. 2d 639 (1967), we rejected the suggestion by a reviewing court that existing carriers have "a proper right" to an opportunity to make amends before new certificates issue. Id., at 411, 86 S.Ct. 539.

"A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the



primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration." 419 U.S. at 299, 95 S.Ct. at 448.

Cross-Sound's attempt here to fend off competition by utilizing NEPA as a weapon to prevent agency action in a licensing proceeding is not without precedent, and has been thoughtfully analyzed in a recent article in the Journal of Air Law and Commerce, Summer, 1976, Vol. 42 No. 3, at pages 529-573, entitled "Miami-Los Angeles and NEPA: The Use of the Environmental Policy Act of 1969 as an Anticompetitive Weapon". As there stated (pp. 529-31):

"There are few proceedings where members of regulated industry have attempted to forestall competition by challenging the adequacy of an agency finding under NEPA in order to delay a final decision. In a recent major Civil Aeronautics Board (CAB) certification proceeding--Miami-Los Angeles Competitive Nonstop case (Miami-Los Angeles)--National Airlines, the incumbent carrier, challenged the agency on precisely that basis. At the eleventh hour, National asserted that the CAB had failed to consider adequately the environmental impact of authorizing a second, competitive carrier on the Miami-Los Angeles route.

"The purpose of this article is two fold: (a) to examine National's use of NEPA as a weapon to delay and attempt to prevent competitive service in its lucrative monopoly market and (b) to review the CAB's response to NEPA before, during and after Miami-Los Angeles.

\* \* \*

"Case law has established both (1) the



standard for agency determinations of whether an impact statement must be prepared and (2) the Courts' role in reviewing that determination. Finally, the CAB's role in reviewing environmental impact in route cases is limited to ascertaining the cumulative and absolute impact of the proposed service.

"In the cases discussed below, it is evident that NEPA is not a substantive restraint upon agency action. Congress did not say that if a Federally funded highway will destroy a park the road may not be built. Instead, NEPA requires the agency to examine and set forth the consequences of its action and to insure that the agency has considered less environmentally harmful alternatives.

"In all kinds of areas, however, NEPA has been used for delay. Often all resort to NEPA gains is delay. At times delay can be fatal, for example, funds are no longer available, or a new administrator takes office." (Footnotes omitted.)

The approach described could not be closer to petitioners' case before this Court.



B. Petitioner's Attempt To Find Procedural Grounds for Reversal In The Environmental Aspects Of This Case Constitute An Elaborate Presentation Of A Non-Issue.

Petitioners spend approximately 7 pages of their brief (pages 28 to 34) castigating the ICC by asserting that it has exhibited a continuing refusal to abide by the statutory mandate of NEPA and related requirements and policies enunciated by the courts. Petitioners imply that the Commission's treatment of environmental questions and its actions in the preparation of the environmental evaluation in this case are a reflection of such a continuing policy. This is nonsense, and irrelevant nonsense at that.

1. Legal Background. Petitioners' entire argument on the environmental issue fails to recognize the ICC's finding that "this decision [to grant Mascony a certificate of public convenience and necessity for a period of three years] is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." JA Doc. 324, 353 I.C.C. at 72. Because of this finding, there was no obligation upon the ICC under NEPA to prepare and file an EIS. 42 U.S.C. §4332(C)(c); Citizens for Reid State Park v. Laird, 336 F.Supp. 783, 789 (D.Me. 1972). Thus, even though the ICC called its evaluation of



environmental factors an "environmental impact statement," it was in function and in legal reality an initial environmental assessment. Therefore, petitioners' attacks on the ICC's environmental analysis in this case are irrelevant insofar as they focus on the procedures required for the preparation of an EIS.

Moreover, because this environmental assessment was fully equivalent to a final EIS and, in fact, satisfied all NEPA requirements for an EIS in its preparation (see below) it also fully complied with the applicable legal standards for initial environmental assessments. See Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290 (1973). Thus, the ICC's finding based on this assessment that its decision on the Mascony application was not a major Federal action significantly affecting the quality of the human environment clearly cannot be overturned as arbitrary, capricious or an abuse of discretion, which is the proper standard of review for such determinations. Hanly v. Kleindienst, supra; First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973). 5/

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5/ Contra, Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).



As to the obligations of a Federal economic regulatory agency when an EIS is not required, NEPA's requirement is only that the agency consider environmental factors in reaching its decision. What is called for is a balancing process by which environmental amenities are weighed with economic and technical considerations. Calvert Cliffs' Coord. Com.. v. United States A.E. Com'n, 449 F.2d 1109, 1113 (D.C. Cir. 1971). This is exactly what the ICC did in this case. JA Doc. 324, 353 I.C.C. at 70-71.

2. Petitioners' Allegations. Petitioners are, at best, disingenuous in alleging that "From its early stages, this case was permeated with environmental considerations," (Pet. Brief, p. 37) when neither petitioners nor any other party raised environmental issues as potentially constituting this case a "major Federal action significantly affecting the quality of the human environment" until after the ALJ initial decision was served.<sup>6/</sup>

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<sup>6/</sup> To the extent parties were concerned with environmental questions, there was testimony and an opportunity for cross-examination at the hearings on these issues. To focus on petitioners' "example" (Pet. Brief, p. 39) having to do with fuel savings, and the allegation that "no protestant was ever permitted to confront the source of the conclusion that such a fuel savings would result," this ignores petitioners' failure to ask for cross-examination and moreover ignores the fact that the issue of fuel savings was discussed in the testimony at the original hearings in this case (e.g. JA Vol. II. C., pp. 614, 747, 753, 759-60, 770, 781-82, 868-89, 967, 973, 987-88, 1020, 1115-16, 1135-36, 1156, 1189, 1244-45, 1283-84, 1508-9, 1535-6, 1567-69, 1586-88). The fuel savings question was discussed in the initial briefs of both applicant and petitioners to the ALJ. JA Doc. 184 (applicant's brief; interestingly, petitioners did not include their brief in the Joint Appendix).



Similarly disingenuous is the statement that "Notwithstanding, the ICC never once permitted petitioner or its supporting intervenors an opportunity to confront the sources of the evidence in the final EIS, despite the fact that the EIS was the basis for the crucially significant findings that the environmental considerations favored a grant of the operating rights here involved. This was plain error under the applicable NEPA case law." Pet. Brief, p. 38.

Examining this crucial basis for petitioners' claim of error, it becomes evident that there is no substance to support it. First, the environmental assessment in a water carrier certification proceeding is made to determine whether, overall, grant of the requested license would constitute a major Federal action significantly affecting the human environment. If the ICC determines the answer to be "no" -- as it has done here -- the positive and negative environmental effects do not form a separate basis for a grant or denial of the application, which is then to be decided on the statutory grounds of whether the service is required by the public convenience and necessity, with the overall environmental balance simply a consideration therein, and whether the applicant is fit, willing and able. 49 U.S.C. §909c. Here, after preparation of an environmental assessment in the form of a draft and final EIS -- a more thorough review of environmental factors than normally required under current ICC environmental regulations for water carrier certification proceedings (see 49 CFR §1108.9(a)(4) and 1108.9(b)) or NEPA -- the ICC



properly determined that no such major Federal action is involved. 7/ The application was not granted, as petitioners seem to imply, because of a positive finding of benefit to the environment from institution of the proposed services (Pet. Brief, pp. 38-29), since this is not part of the showing required to warrant the license. The environmental findings are that (1) the decision to grant the application is not a major Federal action significantly affecting the human environment within the meaning of NEPA, and (2) when all environmental factors are weighed and balanced against each other, the overall effect does not override other public interest factors requiring a grant of the authority sought.

3. The Facts. In effect, one must discount the distortion implicit in petitioners' contention that the Commission did not utilize "to the fullest extent practicable" the procedures ultimately adopted in its own NEPA rules--subsequent to the preparation of the draft EIS and issued after service of the final EIS in this case. The record discloses that the contrary is fact:

a. May 29, 1973 - Application filed. ICC rules then in effect recognize NEPA requirement of a "detailed environmental statement in all reports and recommendations on legislative proposals and other major Federal actions which will significantly affect the quality of the human environment," 49 CFR § 1100.250(b), cited at 350 I.C.C. 499; and require that "In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the

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7/ Indeed, nowhere is this finding--the substance against which any claim of reversible error must be measured--directly challenged by petitioners.



presence or absence of any effect of the requested Commission action on the quality of the human environment ...." 49 CFR §1100.250(d)(1), cited at 350 I.C.C. 500. Applicant complied by stating on its application that granting the authority sought in the application would not constitute a major Federal action having a significant effect upon the quality of the human environment. B & PJ and Cross-Sound/NLFL filed protests and made no environmental statement in these initial papers.

b. June 19, 1974 - ALJ opinion served, finding, inter alia, that "there is no basis to determine whether or not this is a major Federal Administrative proceeding within the meaning of the National Environmental Policy Act of 1969, and that if it were, there is no basis to determine whether the granting of the application would significantly and adversely affect the quality of the environment within the meaning of the Environmental Policy Act enacted by Congress." JA Doc. 188.

c. August 15, 1975 - ICC served decision instituting review of its environmental procedures and proposed rule-making. In reviewing its rules in Ex Parte No. 55 (Sub-No. 4), Revised Guidelines for the Implementation of the National Environmental Policy Act of 1969, 350 I.C. 492 (1975), the Commission observed that "These [then-effective CEQ] guidelines, which are presently in force, do not contemplate the holding of hearings before an Administrative Law Judge prior to the issuance of a draft Environmental



Impact Statement. 340 I.C.C. 441," 350 I.C.C. at 495. The ICC then noted that certain court decisions had found procedures of the FPC and the ICC lacking; that the CEQ had amended its guidelines in line with these decisions; and that since the Court decision concerning the ICC's procedures, the ICC had been in de facto compliance with NEPA and the revised CEQ guidelines (the problem had been the failure to evaluate environmental issues prior to any hearings and to have an independent staff investigation rather than relying on applicant's assertions), 350 I.C.C. at 496; but the ICC recognized the need to codify the changes in its regulations.

d. October 22, 1975. - ICC issued its order, inter alia, requiring its Environmental Staff to prepare an EIS. JA Doc. 249.

e. June 28, 1976 - ICC served its decision adopting new environmental regulations in Ex Parte No. 55 (Sub-No. 4), Revised Guidelines for the Implementation of the National Environmental Policy Act of 1969, 352 I.C.C. 451, (1976). The Commission reiterated its concern with its rules, giving consideration to both lower court decisions and doubts cast thereon by the Supreme Court's subsequent decision in SCRAP II (Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Procedures (SCRAP)), 422 U.S. 289, 95 S.Ct. 2336 (1975)). The CEQ, together with fourteen other parties, had commented on the rules proposed by the ICC; the Commission observed that "In general, CEQ has no objections



to the rules as proposed, and recommends that the Commission adopt them in their present form notwithstanding SCRAP II."

352 ICC at 454.

(i) In accordance with CEQ Guidelines, 40 CFR 1500.6(c), the ICC adopted new rules which identify (1) actions which have the potential for significant environmental impact and normally require an EIS, (2) actions which may have environmental issues present, but do not normally require an EIS, and (3) actions which normally have no environmental issues present. 352 I.C.C. at 458. Water carrier certification proceedings such as that under review here are in the second category. 49 CFR §1108.9(a)(4).

(ii) The Commission then analyzed the steps for EIS preparation (where an EIS is required) and decided that a two-step --draft EIS/final EIS -- procedure was appropriate and in accord with CEQ Guidelines:

"Under this procedure, the purpose of the draft statement is to inform other agencies and the public of the proposed action, potential impacts, and available alternatives, thereby providing the necessary information for consultation. In certain respects the draft statement represents a most vital stage in the NEPA process inasmuch as outside views can enhance objectivity and minimize any bias in the draft statement. The final statement, which generally receives only "in-house" review, can then present to the decision-maker a more objective analysis of environmental impacts. In light of this critical function of the draft statement, consulting agencies should be given as complete a statement as possible, so that the full range of impacts and alternatives are presented at the draft stage." 352 I.C.C. at 459.



While the Commission, in turning to timing of EIS preparation with respect to proceedings initiated under the new rules, indicated that in most instances this should be done prior to any evidentiary hearing, it recognized that in some cases this will not be possible and the EIS may be issued only after conclusion of the hearings. The Commission noted: "In preparing the final statement under this circumstance, the Environmental Affairs Staff would be limited to matters contained in the draft statement and comments thereto, and would be bound by the evidence of record developed during the hearing process." 352 ICC at 461. See also 352 ICC at 467, where, in explaining a change in the final policy rule (49 C.F.R. §1108.3) from that initially proposed, the Commission recognized the need for flexibility in timing of environmental procedures even as to cases commenced under the new rules.

(iii) It is noteworthy that Commissioner Murphy, on whose "vigorous dissent" (Pet. Brief, p. 6) in the case before this Court petitioners place such great reliance, also dissented to the ICC's decision adopting new environmental procedures:

"Having waged a valiant battle against those forces which would bind the Commission by requiring it to undertake exceedingly complex processes in every instance where an allegation that environmental issues are present [sic], the majority, despite the resounding rejection of such requirements by the Court in SCRAP II, would now embrace those very same complex processes, with



modifications. In effect, the majority would reverse the Supreme Court in the SCRAP decisions and affirm the decisions of the lower courts which were effectively overruled. [8/] The question to be asked is 'Of what avail were the prior meritorious efforts of this Commission?' 352 ICC at 476-7.

Commissioner Murphy concluded his dissent against adoption of the new, "complex" ICC environmental rules with the pithy observation that "In a word, form at the behest of others should not take precedence over substance." 352 ICC at 478. We commend this statement to petitioners, who have made every effort in their brief to urge this Court to look only to "form" and totally ignore substance in evaluating the ICC's environmental procedures utilized in this case.

f. Meanwhile, during the pendency of Ex Parte No 55 (Sub-No. 4), the ICC in the case here on appeal was adhering to its policy of complying "to the fullest extent practicable" (49 CFR §1108.3(e)(1)) with a rigorous and independent environmental study. On February 3, 1976, a draft EIS was served, as discussed below, calling for comments by all parties and appropriate Federal, state and local agencies. On June 9, 1976, the final EIS, also discussed below, was served, containing copies of all comments submitted and a

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8/ These are the Greene County and Harlem Valley decisions relied upon by petitioners together with Commissioner Murphy's dissent in the case under review. (E.g., Pet. Brief, pp. 28-37).



complete analysis by the ICC Environmental Staff of such comments, showing which were incorporated into the final EIS, to what extent, and explaining why others were not.

3. November 19, 1976 - ICC issues its decision finding, inter alia, that "this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." JA Doc. 324. The decision noted that it was not until the ICC's October, 1975 order that it was realized that environmental review would be necessary, and explained that certain evidence would be considered only insofar as it was encompassed in the EIS.

4. Summary and Analysis of Environmental "Issue."

When this case commenced, Mascony in accordance with then-current requirements of the ICC's regulations indicated on the application its belief that the application did not involve major Federal action significantly affecting the quality of the human environment. 49 CFR §1100.250(d)(1) cited at 350 I.C.C. 500. No party filed any objection to this statement or contested it. Ultimately, this was the finding of the ICC after preparation of an EIS. JA Doc. 324.

It was only after lengthy hearings had been completed that the ALJ's initial decision was rendered which found that the application could not then be granted because, in his view, further environmental data was needed in order to determine whether major Federal action having a significant impact on the quality of the human environment was involved. The



ICC then proceeded to have its Environmental Staff prepare a draft EIS. Indeed, cutting through the diatribe against the ICC's development of its environmental procedures, this is what petitioners themselves admit, albeit the admission is buried in argumentative language. At page 34 of their brief, petitioners recognize that "that decision [the ALJ's] denied the application at least partly on environmental grounds pointing out that there was insufficient evidence to determine whether an EIS must be filed." Petitioners' brief continues:

"Thereafter, on October 22, 1975, the ICC ordered that investigation be made under NEPA of the environmental impact of the proposal. The ICC then proceeded to prepare a draft EIS, which was served on the parties and various federal, state and local governmental agencies on February 3, 1976. Comments were submitted on the draft Statement by various parties including petitioner and the Incorporated Village of Greenport." Pet. Brief, pp. 34-35.

Petitioners then go on to object to the procedures followed by the ICC in the preparation of the final EIS, which objections boil down to the repetitive assertion that the ICC had not held further hearings and provided for cross-examination of the ICC Environmental Staff prior to adoption of the final EIS or before utilizing this in its decision.

Petitioners misunderstand or ignore two basic points-- at least.

a. The first, and foremost, point is that in light of the ICC's ultimate finding that its decision did not con-



stitute a "major Federal action significantly affecting the quality of the human environment", the preparation of an EIS was not required. It is only where the agency believes such an action may be involved that the preparation of an EIS is dictated by NEPA (or by current ICC rules in accordance with CEQ guidelines as discussed above). Nonetheless, here an EIS was ordered because of environmental questions arising during the hearing and focused upon in the ALJ's decision, and because the ICC's environmental procedures were then under review.

b. The second point carefully ignored by petitioners is the fact that the procedures followed in the preparation of both the draft and the final EIS complied not only with the ICC's then-current procedures, but in substance with those ultimately adopted by the ICC long after the draft EIS in this case had been completed, and issued after service of the final EIS. Petitioners at page 36 point to "this Court's holdings in Greene County and Harlem Valley" which "made crystal clear one requirement with respect to NEPA procedures, namely that the process of preparing an EIS should be a comprehensive one, with fully objective analysis to be achieved by (1) full participation of the government agencies with responsibilities relating to the subject matter, (2) full participation by the staff of the agency, and (3) full participation by the parties themselves. The goal of this participation is to assure an impartial analysis of environmental issues." Apparently petitioners would



place a unique construction on "full participation" in their attempt to find shortcomings here, for looking at the record one sees "full participation" in every sense of the term.

As to "full participation" of appropriate government agencies, the draft EIS was served, with a request for comments, on twelve federal agencies including the U.S. Department of Transportation, Council on Environmental Quality, Environmental Protection Agency, U.S. Coast Guard, Department of Interior, and the U.S. Railway Association. Ten state and four local agencies dealing with environmental and safety concerns including the Connecticut and New York Departments of Transportation and of Environmental Protection as well as the City of New London and Village of Greenport similarly were served and given opportunity to comment, as were the parties to the ICC proceeding. Many of these agencies and parties, including petitioners, did file comments which are not only appended in full to the final EIS utilized by the Commission, but indeed are separately numbered by paragraph with each paragraph individually, carefully and thoughtfully treated in responsive comments fully explaining the ICC Staff's treatment of the issue raised by the comments. JA Doc. 315. The "full participation" of the ICC Staff is not only self-evident, but petitioners Cross-Sound and B&PJ, while objecting to certain conclusions of the draft EIS in their comments, commended the ICC for the thoroughness of its study! JA Doc. 315, pp. 92-93.

Finally, as to "full participation by the parties," which receives the only specific challenge in petitioners'



specious claim that they were "denied" cross-examination, no requests were submitted by any party for cross-examination of either ICC Staff or others in connection with the EIS. The parties were all afforded the opportunity to submit comments, those who wished to do so did, and their comments were fully considered and analyzed by the Staff.

Petitioners recognize that the cases on which they rely in charging ICC reticence properly to deal with environmental matters "principally dealt with another phenomenon, that of an agency abdicating any responsibility for affirmative development of the final EIS" (Pet. Brief, p. 37). They then resort to language that sounds forboding but in the context of this case is meaningless to argue that here we are dealing with rejection of NEPA in the form of "an agency arrogating the preparation of the EIS to itself and never permitting its conclusions to be subjected to meaningful inquiry of the parties," and maintain that the environmental issue should be "subject to confrontation as were the facts relating to the issue arising under the agency's organic statute."<sup>9/</sup> In the circumstances of this case -- with the

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<sup>9/</sup> We would point out that there is no requirement that the ICC hold hearings in every case, even on "issues arising under the agency's organic statute," and indeed the vast majority of its decisions are made on the basis of a written record under modified procedure. Moreover, this Court has itself found that there is no need for a formal hearing on environmental issues in every instance. *Hanly v. Kleindienst*, 471 F.2d 823, 836 (supra).



question of whether environmental considerations required preparation of an EIS arising only in the ALJ's initial decision -- it is clear that the ICC clearly complied with §1108.3(e)(1) of its new environmental rules:

"Proceedings in progress on the effective date of these regulations shall be governed to the fullest extent practicable by the procedures set forth herein, recognizing, however, that full compliance in all such proceedings may not be possible." 49 CFR §1108.3(e)(1), emphasis added.

As the ICC indicated in the cover statement to both the draft and final EIS, these were prepared during the time when the ICC was reviewing its own environmental procedures, and it is clear from the thoroughness of the EIS and the comprehensive analysis done by the Staff both on its own and in reviewing comments submitted by interested parties that, if anything, the ICC was particularly careful and thorough in this case in light of this on-going review. Again, the repetitious assertion by petitioners of the need and right to "confrontation and cross-examination" on environmental matters is both unsupported by any statute or regulation, and ignores petitioners' own failure ever to request confrontation or cross-examination: it is clearly a rather late attempt to find a procedural defect for want of ability to find any substantive defect in the Commission's decision



and the Commission's environmental treatment of this case. Under the "arbitrary and capricious" standard applied by this Court in Hanly (supra), and indeed under any standard of reasonableness, the ICC more than fulfilled its duty of properly examining all environmental issues. Apparently petitioners B&PJ and Cross-Sound/NLFL, initially unconcerned with whether or not the ICC carefully followed its environmental procedures, JA Doc. 221, pp. 10-15, would have had the entire case retried as the only solution to the change in ICC environmental rules which occurred after the ALJ decision and preparation of the EIS. This closely parallels the stalling efforts by an incumbent against a new licensee discussed at length in "Miami-Los Angeles and NEPA: The Use of the National Environmental Policy Act of 1969 as an Anticompetitive Weapon," Journal of Air Law and Commerce, supra. Having forestalled Mascony's efforts to enter and compete for almost five years, petitioner Cross-Sound seeks additional delay before this Court.



C. Appropriate Standards for Determining Public Convenience and Necessity Were Properly Applied.

1. Safety.

One of the major red herrings in the case is petitioners' charge that the Commission failed to meet its responsibilities with respect to the "safety issue", essentially the safety of proposed Mascony operations crossing rail tracks in New London. Thus petitioners appear to contend that the ICC should have disapproved Mascony's application in order to prevent the use of the Sparyard rail grade crossing in New London (Pet. Brief, pp. 12-13)<sup>10/</sup> The fact is that the Commission acted properly within the limits of its authority, but that petitioners and other intervenors in the proceedings seriously misconceive its role.

The Commission's function in acting on an application for authority to engage in water carrier operations is to determine (a) if the applicant is fit, willing and able to perform the service, and (b) if the service proposed meets the present or future public convenience and necessity. See Section 309(c) of the Interstate Commerce Act, 49 U.S.C. §909(c). The ICC is not thereby cast in the role of an all-purpose regulator with respect to every possible ramification

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<sup>10/</sup> Actually, petitioners concentrate their fire on the failure of the ICC to consider evidence on the so-called safety issue. But plainly there can be no procedural failure if the ICC has no responsibilities with respect to the merits of the question.



of the water carrier operation -- particularly where responsibility for the regulation of one or another aspect lies elsewhere.

There are well-established limits to the ICC jurisdiction over safety issues and particularly to its authority over public safety at railroad grade crossings. These limits are definitively set out in American Trucking Associations, Inc. v. United States, 242 F. Supp. 597 (DC DC 1965), aff'd 382 U.S. 373, 86 S.Ct. 543 (1966). In that case the ICC established a proceeding to determine what safety requirements it should impose to avoid accidents at railroad highway crossings as an incident to its regulation of motor and rail carriers. It subsequently dismissed the proceeding, concluding that it had no jurisdiction with respect to highway grade crossing matters. On appeal, the courts held that the ICC was right: the ICC had no jurisdiction; authority rested with state and local governments. The court said:

"Authority over public safety at rail-highway grade crossings has been ruled by the Supreme Court of the United States as peculiarly within the police power of the states." 242 F.Supp. at 599.

At the time the American Trucking Assoc. case was decided, the ICC had certain statutory responsibilities to oversee safety practices. This authority was subsequently transferred to the Department of Transportation (DOT). 49 U.S.C.



§1655(e). The fact that the ICC had some authority over safety practices did not persuade the court that the ICC had jurisdiction over rail grade crossings. For one thing, Congress had considered the question and declined to so authorize the ICC. Now that the ICC's safety functions have been transferred to DOT, there can be no possible basis for suggesting that the ICC should make regulatory determinations about rail grade crossings.

Since the ICC's safety authority was transferred to DOT, there have been additional legislative actions which make it plain that to the extent authority over rail grade crossings does not lie with the state and local governments, <sup>11/</sup> such authority rests with DOT. What is more, Congress has itself made specific legislative determinations with respect to rail grade crossings at New London -- determinations which are at odds with the actions petitioners and opposing intervenors say the ICC should have taken.

DOT's petition to intervene in the ICC proceedings (filed in August, 1977, just before the ICC issued its decision on reconsideration) candidly admits that DOT is charged with safety responsibilities in connection with railroad grade crossings and railroad operations under

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<sup>11/</sup> The State of Connecticut has a statutory program to regulate railroad crossings. See §§ 16-98 et. seq. of Chapter 279 of the Conn. Gen. Stat., and see particularly §§16,103-104.



49 U.S.C. §1655(e), 45 U.S.C. §7421 et. seq. and 45 U.S.C. §851 et. seq., the Northeast Corridor Improvement Project. 12/

As part of the legislatively mandated program to improve the Northeast rail corridor, Congress assigned DOT the responsibility for dealing with public ground-level rail-highway crossings. 23 U.S.C. §322. 13/ In doing so, it specifically directed that the Sparyard grade crossing in New London Connecticut -- the grade crossing which Mascony's operation will use -- remain available for public use. In 1974, Congress amended §322 to authorize the Secretary of Transportation to permit continued operation over rail grade crossings. The Senate Committee explained:

"The proposed amendment is specifically designed to accommodate a situation in New

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11/ DOT misstated its responsibility under 49 U.S.C. §1653(e) to advise the ICC about applicants for permanent operating authority. Section 1653(e) does not, as DOT implies, authorize broad ICC consideration of all safety aspects of an applicant's proposed service in response to DOT input. Rather it directs a narrow report by DOT to the ICC on the "safety compliance records" of each applicant. As shown below, the ICC's responsibilities with respect to safety fitness of applicants is to determine whether or not the applicant has shown the ability and inclination to comply with safety requirements imposed by others. The ICC is not empowered to impose such requirements itself. Section 1653(e) illustrates Congress' recognition of the limited ICC role.

13/ Petitioners' brief acknowledges that DOT "is the agency entrusted by Congress with primary responsibility for railroad crossing safety between Washington, D.C. and Boston, Mass." Pet. Brief, p. 21.



London, Connecticut, where trains are presently restricted to speeds of 25-30 m.p.h. because of severe track curvature, and where track relocation is not considered feasible. There are five crossings considered to be of unusually low potential hazard--Spar Yard Street, Coast Guard Dock, Sail Loft, State Street, and Hallam Street--where it is believed the installation of warning and protective devices would offer a more appropriate solution than the elimination of crossings at grade." Report No. 93-1111, Senate Committee on Public Works, 93d Cong., 2d Sess., 1974.

In other words, Congress has given the DOT responsibility over rail grade crossings and has instructed DOT to permit the continued use of the grade crossing involved in Mascony's operation.

Not only has the ICC no jurisdiction to determine that particular grade crossings in New London should or should not be used as part of a water carrier operation--or to determine the conditions under which a crossing might be used--but even if it had such authority it would be bound to exercise it in accordance with Congress' express directive. In the face of the clear mandate of Congress the cries of petitioners and DOT (who apparently do not agree with Congress) that the ICC should step in and halt use of the Sparyard crossing is nothing but an attempted "end run" around the legislature.

In ruling on applications for operating authority, the ICC's function is to determine whether the applicant is willing and able to meet the safety requirements imposed



under state and local law and by other federal agencies.

See, e.g., Harry Folker & William Folker Extension of Operations -- Coal, 34 M.C.C. 449 (1942); Hughes Transportation, Inc. Extension-Southeastern States, 46 M.C.C. 603 (1946); Midwest Coal Transport, Inc. Extension -- Duluth, Minn., 105 M.C.C. 724. (1967), modified, 106 M.C.C. 380 (1968). <sup>14/</sup> See also, Eagle Motor Lines, Inc., Investigation and Revocation of Certificates, 117 M.C.C. 72 (1972) (ICC proceeding to see if applicant's refusal to meet safety requirements established by DOT under Interstate Commerce Act should result in revocation; ICC explained that DOT prescribes rules and that ICC sees that carriers who do not comply are not permitted to operate); Public Utilities Comm. of Ohio v. Riss & Co., Inc., 72 M.C.C. 659 (1957) (State requests revocation for failure to meet safety regulations).

It simply is not the ICC's job to establish safety requirements for every grade crossing that a truck operated by an ICC motor carrier must cross, or water carrier passengers may use. <sup>15/</sup> It is the ICC's job to refuse a certificate where it is shown that the applicant does not obey safety

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<sup>14/</sup> Commissioner Murphy's dissent recognizes that regulation of safety is principally lodged with DOT, and explains that the ICC's concern is to be satisfied that the applicant will comply with safety regulations, citing Ewen Brothers, Inc. Common Carrier Application, 117 M.C.C. 101 (1972), a case where an applicant was found unfit because of his record of violations (JA Doc. 324, 353 I.C.C. at 75). No authority has been cited which would authorize the ICC to make safety regulations.

<sup>15/</sup> To the extent the Village of Greenport's complaint that Mascony's operations will increase traffic is cast as a safety question (Pet. Brief, pp. 13-14), the same principles apply. The ICC is not empowered to make determinations about local traffic conditions.



requirements. The record plainly demonstrates Mascony's willingness to comply.<sup>16/</sup>

## 2. Competitors' Interests.

Another major red herring in the case is presented as a procedural issue, i.e., that the ICC failed to consider evidence of so-called "changed circumstances" involving Cross-Sound's service which, allegedly, would have strengthened Cross-Sound's arguments that it should be permitted to continue its own ferry operations without competition (Pet. Brief, p. 69). In fact, this is really an issue of substantive law, although it is dressed in procedural issue's clothing.

The gist of Cross-Sound's claim is that the Commission, erred in refusing to reopen the record to take into account evidence (a) that Cross-Sound had introduced various service innovations which Mascony had proposed such as a reservations system and a new sailing schedule; (b) that Cross-Sound was going to build new facilities and ships; and (c) that there was a decline in traffic. What this boils down to is that Cross-Sound is distressed that the ICC decided to permit Mascony to compete with Cross-Sound rather than to protect Cross-Sound from competition. Yet the ICC's actions were well within judicially approved standards from both a procedural and substantive standpoint.

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<sup>16/</sup> Mascony has made appropriate applications to each body having jurisdiction of any element of its proposed operations, e.g. JA Doc. 207, App. A and B, JA Doc. 357 App. 5; indeed, no party has alleged to the contrary.



a. Petitioners Were Afforded A Fair Chance to Protest Mascony's Application.

Even petitioners concede that the ICC is within its rights in refusing to reopen proceedings to receive new evidence, since there must be a cut-off point if the administrative process is to end. (Pet. Brief, pp. 15-16.)<sup>17/</sup> But they contend that the ICC acted unfairly here because it allowed Mascony to update the record while it "uniformly denied petitioner and its supporting intervenors the same opportunity". (Pet. Brief, p. 16.) A look at the facts casts a very different light on the matter. Both Mascony and petitioners were afforded opportunities to update the record on material matters. The Commission did not give any improper advantage to Mascony.

The only evidence which petitioners sought to introduce which was not received by the Commission was the evidence of "changed circumstances" with respect to the adequacy of the existing service (JA Doc. 282). Mascony was permitted to update the record on environmental/safety matters, but petitioners were also permitted to do so. There were two such occasions.

(i) After the ALJ's decision raising the environmental question, Mascony asked to introduce exhibits on these issues. Petitioners did not seek to introduce evidence at this time. Ultimately the Commission did not consider Mascony's evidence independently, but only to the extent

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<sup>17/</sup> Indeed, Cross-Sound/NLFL and B&PJ invoked this very doctrine at the "exceptions" stage of this proceeding (JA Doc. 221, pp. 22-23).



the Commission's own EIS incorporated this evidence (JA Doc. 324, 353 I.C.C. at 63) together with comments submitted by numerous parties--including petitioners--on the draft EIS, as fully discussed above.

(ii) When the Commission's decision was issued, petitioners asked for reconsideration on the basis of alleged changes in Mascony's ability to provide dock and staging facilities. The Commission permitted Mascony to submit evidence on docking and staging at Greenport and New London and petitioners and intervenors were permitted to submit evidence in reply. (JA Docs. 356, 357, 359, 361, 362, 364, 365, 366). Mascony's attempt to submit further rebuttal evidence was rejected. (JA Doc. 378.)

The ICC did not violate any of petitioners' rights when it refused to accept evidence of changed circumstances.<sup>18/</sup> The ICC is not obliged to do so. The courts have so held. See Frozen Foods Express, Inc. v. United States, 346 F. Supp. 254, 259 (W.D. Texas, 1972) where the Court said:

"Plaintiffs' assertion that the Commission erred in failing to allow plaintiffs to show they could provide adequate service is without merit. The Commission does not have to give existing carriers this opportunity. United States v. Dixie Highway Express, Inc., 389 U.S. 409, 411, 88

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<sup>18/</sup> It certainly did not discriminate against Cross-Sound; it acted no differently than it has in other cases to prevent the proceedings from running on endlessly. See, e.g., Cedar Rapids Steel Transportation, Inc. v. I.C.C., 391 F.Supp. 181 (N.D. Iowa 1975); National Trailer Convoy, Inc. v. United States, 381 F.Supp. 878, Aff'd sub. nom Morgan Drive Away, Inc. v. United States, 416 U.S. 976, 94 S.Ct. 2377 (1974); Carolina Freight Carriers Corp. v. United States, 323 F.Supp. 1296 (W.D. N.C. 1971); Great Northern Pacific & Burlington Lines, Inc.--Merger, etc.--Great Northern Railway Company, et. al., 331 I.C.C. 228 (Nov. 30, 1967); aff'd sub. nom. United States v. United States, 296 F.Supp. 853 (D.D.C. 1968), aff'd sub. nom. United States v. I.C.C., 396 U.S. 491, 90 S.Ct. 700 (1970).



S.Ct. 539, 19 L.Ed 2d 639 (1967) (per curiam). Furthermore, the Commission is not obligated to make a finding that the existing service is inadequate in order to grant the extensions. Texas Mexican Ry. v. United States, 250 F.Supp. 946, 950 (S.D. Tex. 1966)."

Nor do the authorities cited by petitioners (Pet. Brief, p. 26) indicate that the ICC has strayed from its duty. Delta Airlines, Inc. v. CAB, 561 F2d 293 (D.C. Cir. 1977) (which petitioners cite as controlling) specifically approved the CAB's refusal to permit a carrier protesting a grant of authority to update the record on the need for competition issue. 561 F.2d at 306, fn. 15.

In the Delta Airlines case, the CAB itself selected facts to update the record. This and other very unusual circumstances impelled the court to require carrier participation in the updating to recognize significant intervening events, including a change in Board policy. 561 F.2d at 311. These factors are not present here. The ICC properly determined that evidence of changed circumstances would not be significant, particularly since it was not obliged to deny an application to establish competitive service because of possible adverse impact on existing service. The ICC's action here fully met the Delta Airlines test that "it must proceed in a manner fair to all concerned". (561 F.2d at 312.) Petitioners' real objection here is to the outcome -- not to the agency's procedures.



b. The ICC Properly Ruled in Favor of Competition.

The Supreme Court, in Bowman Transportation Company v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438 (1974), specifically held that the ICC is not obliged to go along with such showings as Cross-Sound proffered. Rather, the ICC is entitled to be skeptical when a protestant against the authorization of a new service belatedly introduces the same service improvements as proposed by the potential competitor. There is nothing wrong, the Court said, in the agency's relying on the demonstrated shortcomings in the protestant's service during the period of record. The Court explained why the Commission had acted properly:

"The Commission recognized that protesting carriers might have been spurred to improve their service by the threat of competition raised by the designation of applicants for hearing. Therefore, reasoned the Commission, the protesting carriers' performance subsequent to the notice of hearing might be superior to the service they normally offered, and their exhibits, covering those periods, had to be read in light of that possibility. But the Commission was not precluded from relying upon the demonstrated shortcomings of the protesters' service during that period, for the incentive effect the Commission identified would have, if anything, distorted the performance studies in the protesters' favor.

"The issue before the Commission was not whether the appellees' service met some absolute standard of performance but whether the 'public convenience and necessity' would be served by the entry of new carriers into the markets served by appellees.... Even if the Commission had accepted appellees' exhibits at face value, it could still have



concluded that the deficiencies were sufficient to justify the admission of additional carriers. Certainly the Commission was entitled to regard the appellees' studies as possibly non-representative of the usual service afforded, [4/] to reason that the shortcomings were probably greater than these studies showed, and to conclude that the service would be improved by granting the applications." 419 U.S. 287, 289, 95 S.Ct. at 443.

Not only is the ICC entitled to discount belated service improvements designed to ward off competition, but it is also perfectly proper for it to disregard evidence that there had been a decline in traffic since the hearings. Bowman explains that the Commission is not obliged to give primary consideration to protecting existing carriers from competition. The fact that the existing carrier may suffer business losses does not prevent the ICC from authorizing competition. (419 U.S. at 293, 95 S.Ct. at 445.) The Commission is entitled -- indeed, encouraged -- to carry out a policy favoring competition. Later courts following Bowman have said that:

"Where an agency, based upon its own expert knowledge of the industry under its control, determines that competition in and of itself is a desirable objective, that agency determination must be upheld. Eastern Air Lines, Inc. v. CAB, 271 F.2d 752, 759 (2d Cir. 1959); Petroleum Carrier, supra, 258 F.Supp. at 614-617." Trans-American Van Service, Inc. v. U.S., 421 F.Supp. 308, 323 (N.D. Tex. 1976).

The determination that competition is a desirable objective is the bottom line here. The Commission authorized Mascony's service rather than protect Cross-Sound's monopoly.



It said:

"However, even if the new operations should disrupt existing service, there is no right to engage in water transportation without competition, especially where, as here, the service has not been satisfactory". JA Doc. 324, 353 I.C.C. at 69.

The Commission acted properly in opting for competition; it was not obliged to reopen the record to receive evidence of circumstances which need have no effect on its determinations.<sup>19/</sup>

### 3. Mascony's Ability to Perform.

A final phantom issue is petitioners' claim that applicant must be denied the opportunity to compete because it is not ready to start operations the moment the ICC certificate is granted. Of course, this is petitioners' rule and not the ICC's, but if it were the rule, the ICC's

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<sup>19/</sup> The Commission's decision is Mascony follows a policy favoring competition, as expressed in numerous recent Commission decisions. See, e.g., Tri-State Motor Transit Co., 125 M.C.C. 343, 350 (1976):

"Although a certain amount of traffic may be subject to diversion, existing carriers have no absolute immunity against future competition. See Patterson, supra. Where as here, the competition resulting from newly authorized service will cause a carrier already providing the service to lose revenue, the issuance of new authority may best serve the public convenience and necessity."

Load & Co. Truck Line Common Carrier Application, 125 M.C.C. 593 (1976); Chickasaw Motor Line, Inc. --Extension, --Memphis, Tenn., 121 M.C.C. 476 (1975), Jerry L. White Contract Carrier Application, 126 M.C.C. 852 (1977); Bralley-Willett Tank Lines, Inc. Extension--Hopewell, 126 M.C.C. 236 (1977). Commissioner Murphy's dissent is a regular feature of these cases, and his dissent in this case should be placed in this context. He avowedly favors the policy of protecting existing carrier operations. Thus, although he focused on so-called procedural shortcomings in this case, the real basis of his dissent is a substantive disagreement with the majority's pro-competition determination.



action would be so arbitrary, capricious and unreasonable that it could not pass judicial muster.

To a person who wishes to begin a new ferry service, the need to secure an ICC certificate is a major hurdle, but it is not the only obstacle. The need for local and state approvals abound. Here Mascony has vaulted many of these hurdles, e.g., it has the go-ahead from the State of New York Department of Environmental Conservation for its proposed operations at Greenport (JA Doc. 207, App. A and B), but some matters remain pending. Since other approvals and permits may be denied on the grounds that without the ICC's approval there is no reason to believe the operations are possible, 20/ were the ICC to hold that its certificate could only be given when all other approvals and permits were received, this would be a "Catch-22" regulation.

However, the ICC very sensibly ruled that its approval would no longer be a bar to competition, but rather that having met the statutory criteria, Mascony should be given the right to go ahead, on an experimental basis, to see if it could succeed.21/ This was wholly consistent with its

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20/ E.g. JA Doc. 315, pp. 44-45.

21/ As shown above, some of the stumbling blocks which protestant claim impede the Mascony operation, such as the grade crossing issue, are not as serious as petitioners contend. Moreover, as the ICC pointed out, cooperation by various parties is needed, and it warned that "if a particular party has via unreasonable actions hindered good faith efforts by applicant to, in particular, operate in a manner which causes minimum environmental harm" (JA Doc. 324, 353 I.C.C. at 71), the ICC would take that into account in deciding if the certificate should be extended.



responsibilities to determine that Mascony is fit, willing and able to perform the service.<sup>22/</sup> The courts have flatly rejected petitioners' claim that an applicant must be ready to begin operations at once. In Atchison, Topeka & Santa Fe Railway Co. v. United States, 300 F. Supp. 1339 (N.D. Ill. 1969), aff'd, 396 U.S. 275, 90 S.Ct. 568 (1970), railroad protestants opposed the ICC's grant of a water carrier certificate to Sea-Land Service, Inc., arguing that "Sea-Land is not providing ... service and has no real intention of instituting service within a reasonable period of time." (300 F.Supp. at 1341.) The Court said:

"This latter point was included in

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<sup>22/</sup> The authorities cited by petitioners (Pet. Brief, p. 43) are consistent with the Commission's actions here. In the first case cited, the ICC certificate was granted despite claims that applicant's proposed technical advancement was unsafe or that protestants would lose traffic. Western Auto Transports, Inc., Extension--Lumber, 72 M.C.C. 345 (1957). The grounds for ICC denial of certificates in the rest of the cases cited are inapplicable here. Stone Lines, Inc., Contract Carrier Application, 54 M.C.C. 310 (1952) (ICC's new rule to be effective shortly would prohibit lease arrangements contemplated); Cheeseman Contract Carrier Application, 86 M.C.C. 176 (1961) (shipper seeking lower rates via contract carrier service, no showing of service advantages, applicant would operate at loss without backhaul); Bowman Transportation, Inc., Extension--Florida, 107 M.C.C. 876 (1968) (application was for irregular route service but regular route service to be offered, and diversion of traffic from existing service without compensating service benefits). Finally, the ICC Policy Statement cited is by its terms applicable to motor carriers and deals with the special problem of empty backhauls.



plaintiffs' (railroad protestants' petition before the Commission for reconsideration and for relief under Rule 1.102. In its reply thereto, Sea-Land acknowledged that it had diverted certain of its vessel tonnage to the United States Government for military use and was therefore unable to commence immediately the service authorized by the certificate. We agree with Sea-Land that it should not, under these circumstances, be penalized by withholding its authority at this time." (300 F.Supp. at 1341)

There is no legal or equitable reason for Mascony to be foreclosed from the chance to institute a competitive service because there are some remaining local matters to clear up.



D. The Commission Properly Denied Amtrak's Petition for Leave To Intervene in This Proceeding.

When, on June 7, 1977, Amtrak filed with the Commission its petition for leave to intervene and to file a verified statement, the record before the Commission was closed. Indeed, the Commission's Order for Reconsideration dated June 14, 1977, not only denied Amtrak's petition but also disposed of the limited remaining issues involved in the limited reopening authorized by the Commission's order of April 5, 1977.

Generally, no reviewing Court would fault the Commission for denying a petition for leave to intervene practically at the end of an already prolonged administrative proceeding.

Amtrak's petition to the Commission, like its brief in this Court, focused solely upon the safety aspects of passengers and vehicles having access to Mascony's proposed service at New London only over a grade crossing over Amtrak's line of railroad on which it operates a Boston-New York-Washington passenger service (the Northeast Corridor).

This was not an overlooked issue in the case. Thus, in its report served November 19, 1976, the Commission noted (JA Doc. 324, 353 I.C.C. at 70) that:

"The Commission's environmental impact statement raises serious questions as to the effect the proposed operation would have on the environment....a potential safety hazard will be created as a result of the need for ferry-related traffic in New London to cross Con-Rail tracks to gain access to the landing site."



The Commission recognized that Mascony would need to obtain various permits from State and local authorities with respect to docking and staging and that "Should such permits be withheld and applicant be unable to locate a different site in Greenport or New London that would enable it to obtain the required permits, then the proposed operation would in all likelihood never begin (JA Doc. 324, 353 I.C.C. at 71). This is a major reason why the Commission limited the certificate granted to Mascony to a term of three years.

The safety problem created by the intersection of highways and grade crossings has long been a matter of public concern in this country. However, as we have pointed out above, the ICC never had responsibility for grade crossing safety, and, with the creation of the DOT all of the ICC's safety powers were transferred to that department. Indeed, at the Federal level, responsibility for the elimination of public grade crossings through the expenditure of Federal grant in aid funds is vested in the Secretary of DOT. 23 U.S.C. §322.

Illustrating what have always been the practical problems in eliminating grade crossings, section 322 was amended in 1975 to provide that "The Secretary may permit selected individual public crossings of unusually low-potential hazard to remain at grade level, if they are



provided with the best available protection." This amendment had its origin in the fears of the City of New London that the elimination of grade crossings to its waterfront would be a municipal disaster, and is discussed above at pages 34-36.

Amtrak now contends to this Court that Mascony's proposed ferry service would produce an increased volume of pedestrian and vehicle traffic over the crossing which would violate the "unusually low-potential hazard" standard of 23 U.S.C. 322, as amended in 1975. (Amtrak Brief, p. 8.) Assuming that such an issue exists, Amtrak should present it to the Department of Transportation -- not belatedly to the ICC.

We have already pointed out that while the ICC has no jurisdiction over railroad grade crossings, DOT does. In addition, the Public Utilities Commission of the State of Connecticut administers a broad statutory regulatory program over railroad grade crossings. See Chapter 279 of the Connecticut General Statutes, 16-98 et. seq., and particularly 16-103,104.

We are entitled to assume that Amtrak's basic position is that stated in the verified statement of Bruce L. Gordon (p. 14) attached to Amtrak's brief in this Court that:

"...Amtrak is very much opposed to the applicant's proposed use of the Sparyard Street crossing and would respectfully



request that the Commission not grant its approval to such a deadly plan. In the alternative, at the very least, a grade separation structure should be required."

We submit that Amtrak's contentions as to grade crossing safety at New London were not only presented belatedly to the ICC, but moreover that the proper places to raise them are before the DOT and the Connecticut authorities.

In its brief, Amtrak refers to its Congressional mandate to operate high-speed trains over the line in question between Boston and New York, thereby suggesting that access to Mascony's proposed ferry service by a grade crossing over Amtrak's right of way will undermine the service objectives of the Northeast Corridor project. We would point out three factors which Amtrak does not address: (1) petitioner Cross-Sound's ferry service also can only be reached at New London by a grade crossing over Amtrak's right of way; (2) Congress has declared its views on the New London grade crossings as stated in the report of the Senate Committee on Public Works on the 1975 amendment to 23 U.S.C. 322, referred to above:

"The proposed amendment is specifically designed to accommodate a situation in New London, Connecticut, where trains are presently restricted to speeds of 25-30 m.p.h because of severe track curvature, and where track relocation is not considered feasible."

and (3) many of Amtrak's trains stop at New London and therefore must slow down in any event.

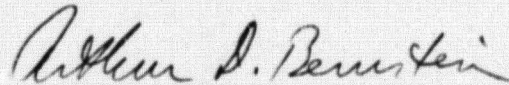


In sum, Amtrak appeared too late, in the wrong forum, and with an issue precluded by prior Congressional mandate.

#### IV. CONCLUSION

For the foregoing reasons, the Interstate Commerce Commission's decision granting a three-year term water carrier certificate to Mascony Transport and Ferry Service, Inc., should be affirmed.

Respectfully submitted,



ROBERT W. GINNANE  
OLGA BOIKESS  
ARTHUR D. BERNSTEIN  
Galland, Kharasch, Calkins & Short  
1054 Thirty-First Street, N.W.  
Washington, D.C. 20007  
Tel. (202) 333-2200

FRANK J. WEINER  
WESLEY S. CHUSED  
15 Court Square  
Boston, Massachusetts 02108  
Tel. (617) 742-3530

RICHARD T. HAEFELI  
McNulty, DiPietro, Nesci & Haefeli  
130 Ostrander Avenue  
P.O. Box 757  
Riverhead, New York 11901  
Tel. (516) 727-8200

Attorneys for  
Mascony Transport and Ferry  
Service, Inc.

November 21, 1977







UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

|                                  |   |                            |
|----------------------------------|---|----------------------------|
| CROSS-SOUND FERRY SERVICES, INC. | ) |                            |
|                                  | ) |                            |
| Petitioner,                      | ) |                            |
|                                  | ) |                            |
| v.                               | ) | No. 77-4162                |
|                                  | ) |                            |
| THE UNITED STATES OF AMERICA and | ) | (Petition for Review of    |
| INTERSTATE COMMERCE COMMISSION,  | ) | A Decision Of The Inter-   |
|                                  | ) | state Commerce Commission) |
| Respondents.                     | ) |                            |
|                                  | ) |                            |

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of November, 1977, served two copies of the Brief of Intervenor Mascony Transport and Ferry Transport Service, Inc. by first-class mail, postage prepaid, upon the following:

Ellen K. Schall, Esq.  
Office of the General Counsel  
Room 5412  
Interstate Commerce Commission  
12th & Constitution Ave., N.W.  
Washington, D.C. 20423

Peter R. Reilly, Esq.  
955 L'Enfant Plaza North,  
Washington, D.C. 20024

John J. Munzel, Esq.  
548 Roanoke Avenue  
Riverhead, New York 11901

Gordon P. MacDougall, Esq.  
1100 17th Street, N. W.  
Washington, D. C. 20036

Andrea Limmer, Esq.  
Justice Department  
9th & Constitution Ave., N.W.  
Washington, D. C. 20530

Robert W. Tasker, Esq.  
425 Main Street  
Greenport, New York 11944

Peter A. Greene, Esq.  
Neal A. Jackson, Esq.  
Norman J. Phillion, III, Esq.  
CALDWELL & GREENE  
900 17th Street, N. W.  
Washington, D. C. 20006

John J. Walsh, Esq.  
Howard W. Burns, Esq.  
CADAWALADER, WICKERSHAM & TAFT  
One Wall Street  
New York, New York 10005

